Pacific & Orient Insurance Co Bhd v Thayamal a/p M Raman & Ors

HIGH COURT (ALOR SETAR) — ORIGINATING SUMMONS NO 24NCVC-484–03 OF 2012
SEE MEE CHUN JC
17 JUNE 2013

Insurance — Accident insurance — Statutory declaration — Accident involving motorbike ridden by third party and motorcar belonging to another — Whether there was conspiracy between car driver and owner — Duty to inform actual insured — Whether allegation proven — Third party's right to recover — Whether right of third party affected — Road Transport Act 1987 s 96(1) & (3)

The present application arose from a civil suit in respect of an accident involving the third defendant who was riding a motorbike and the second defendant who drove a car owned by the first defendant. The plaintiff, an insurance company, alleged that there was a conspiracy between the first and second defendants not to inform them of the actual insured which was the statutory declaration of the first defendant showing the purchase of the motorcar was only in the first defendant's name and the deposit and instalments were paid by the second defendant who was using the motorcar all the while. Therefore, the plaintiff sought for a declaration that the insurance policy issued to the first defendant be declared void and unenforceable. The third defendant opposed the plaintiff's application and averred that the plaintiff must prove the allegation of conspiracy as the latter's case couched entirely on the first defendant's statutory declaration. The plaintiff contended that the third defendant's rights would not be affected by the declaration as the third defendant was not a party to the contract of insurance.

Held, dismissing the application:

(1) The primary consideration in dismissing the application was that the essential facts alleged to be concealed were in fact never concealed. The plaintiff said that there was a conspiracy between the first and second defendants in that the second defendant was in fact the true insured. By looking at the cover note issued the words 'policy holder Sannasi Naidu a/l Kannaiah' were inserted. It appeared that both the first and second defendants were the insured and policy holder. There was no explanation from the plaintiff on this and it could therefore be inferred that the plaintiff had knowledge of the second defendant's interest (see para 4).

(2) The thrust of the plaintiff's application rested on the statutory

declaration of the first defendant. The truth or otherwise of it was not tested by the third defendant and it had not therefore been strictly proved (see para 6).

(3) The third defendant's right to recover is entrenched in s 96(1) of the Road Transport Act 1987 ('RTA') just as the plaintiff's right as against the insured is in s 96(3) of the RTA. In this regard, s 96(3) of the RTA when read together with s 96(1) deals with the liability of the plaintiff towards third parties such as the third defendant. Therefore, there was no statutory duty on the plaintiff to apply for a declaration as against its insured (see para 9).

[Bahasa Malaysia summary

Permohonan ini berbangkit daripada tindakan sivil berkaitan kemalangan yang melibatkan defendan ketiga yang menunggang motosikal dan defendan kedua yang memandu kereta yang dimiliki oleh defendan pertama. Plaintif, syarikat insurans, mendakwa bahawa terdapat konspirasi di antara defendan pertama dan kedua untuk tidak memberitahu mereka mengenai jumlah yang diinsuranskan sebenar yang mana adalah perisytiharan statutori defendan pertama menunjukkan pembelian motokar hanya dalam nama defendan pertama dan deposit dan bayaran ansuran dibayar oleh defendan kedua yang mengguna motokar pada kesemua masa. Plaintif dengan itu memohon untuk perisytiharan bahawa polisi insurans yang dikeluarkan kepada defendan pertama disytiharkan terbatal dan tidak boleh dikuat kuasa. Defendan ketiga menentang permohonan plaintif dan berhujah bahawa plaintif harus membuktikan tuduhan konspirasi memandangkan kes plaintif berdasarkan keseluruhannya atas perisytiharan statutori defendan pertama. Plaintif berhujah bahawa hak defendan ketiga tidak akan dijejaskan dengan perisytiharan tersebut memandangkan defendan ketiga bukan pihak kepada kontrak insurans.

Diputuskan, menolak permohonan:

(1) Pertimbangan utama dalam menolak permohonan adalah fakta penting yang didakwa disembunyikan sebenarnya tidak pernah disembunyikan. Plaintif menyatakan bahawa terdapat konspirasi di antara defendan pertama dan kedua di mana defendan kedua sebenarnya yang diinsuranskan. Dengan melihat kepada nota lindung yang menyatakan perkataan-perkataan 'policy holder Sannasi Naidu a/l Kannaiah' dimasukkan. Jelas kedua-dua defendan pertama dan kedua yang diinsuranskan dan pemegang polisi. Tidak terdapat penjelasan daripada plaintif atas ini dan oleh itu ia dapat dianggap bahawa plaintif mempunyai pengetahuan mengenai kepentingan defendan kedua (lihat perenggan 4).

(2) Teras permohonan plaintif bergantung ke atas perisytiharan statutori

defendan pertama. Kebenaran atau sebaliknya tidak diuji oleh defendan ketiga dan oleh itu tidak dibuktikan dengan betul (lihat perenggan 6).

(3) Hak defendan ketiga untuk mendapatkan semula diberikan dalam s 96(1) Akta Pengangkutan Jalan 1987 ('APJ') seperti juga hak plaintif terhadap orang yang diinsuranskan adalah dalam s 96(3) APJ. Berkenaan ini, s 96(3) APJ apabila dibaca bersama s 96(1) menangani liabiliti plaintif terhadap pihak ketiga seperti defendan ketiga. Oleh itu, tidak terdapat tugas statutori ke atas plaintif untuk memohon perisytiharan terhadap orang yang diinsuranskan (lihat perenggan 9).]

Notes

For cases on accident insurance in general, see 8(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 1–13.

Cases referred to

Merchants' and Manufacturers, Insurance Co Ltd v Hunt and Others [1941] 1 All ER 123, CA (refd)

Tan Kang Hua v Safety Insurance Co [1973] 1 MLJ 6, FC (refd)

Legislation referred to

Road Transport Act 1987 s 96(1), (3)

RK Nathan (Vinod Kamalanathan & Associated) for the plaintiff.
Manoharan Veerasamy (Manoveera & Co) for the third defendant.

See Mee Chun JC:

[1] Enclosure (1) is Pacific & Orient Insurance Co Bhd's ('P&O') application for a declaration the policy of insurance and certificate issued to D1 to cover motorcar No AEH 3181 be declared void and unenforceable. Prayer (b) that P&O is not liable to pay any judgment sum in Civil Suit Sungai Petani Sessions Court No 53–1019 of 2010 ('civil suit') instituted by D3 was dropped. The civil suit was in respect of an accident on 5 June 2010 involving D3 who was riding motorbike PJJ 5625 and D2 as the driver of motorcar AEH 3181 and D1 as the owner. References to defendants are as in this originating summons.

[2] P&O alleges there was a conspiracy between D1 and D2 not to inform them of the actual insured as exh 'UD3' which is the statutory declaration of D1 shows the purchase of motorcar AEH 3181 was only in D1's name and the deposit and instalments were by D2 who was using the car all the while. The particulars of conspiracy were pleaded in para 11:

(a) Obtaining the insurance cover in the name of the 1st Defendant when

A they knew that at all material times the true insured would be Sannasi Naidu a/l Kannaiah, the 2nd Defendant;

(b) Knowing that he was not the true insured, the 1st Defendant failed to declare to the Plaintiff who the actual insured was to be and thereby being in breach of *uberrimae fidei*;

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(c) Knowing that he was to be the actual insured, the 2nd Defendant failed to declare to the Plaintiff that he was to be the actual insured and thereby being in breach of *uberrimae fidei*;

(d) Both the Defendants conspired amongst themselves and thereby are in breach of *uberrimae fidei*; and

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(e) Falsely declaring who the true insured is to be and thereby falsely obtaining the road tax for the said motorcar.

D **[3]** The application was opposed by D3 who had been granted leave to intervene on 26 July 2012. It was averred by D3 in encl (33) the allegation of conspiracy had to be proved and as the plaintiff's case rested entirely on D1's statutory declaration it ought to be verified by D2.

E **[4]** The primary consideration in dismissing the application was that the essential facts alleged to be concealed were in fact never concealed. Here P&O says there was a conspiracy between D1 and D2 in that D2 was in fact the true insured. By looking at the cover note issued ('UD1') the words 'policy holder, Sannasi Naidu a/l Kannaiah' are inserted. Here it appears both D1 and D2 were the insured and policy holder. There was no explanation from P&O on this and

F it can therefore be inferred P&O had knowledge of D2's interest.

[5] In *Tan Kang Hua v Safety Insurance Co* [1973] 1 MLJ 6 it was held at pp 8–9:

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> … a more logical inference is that the plaintiffs were aware of the facts which were alleged to have been concealed by the defendant at the time of the issue of the policy. If they were in fact aware of such facts, as would appear more probable from the evidence taken as a whole, they were not entitled to the declaration which they asked for. This is clear from the following statement of the law in *MacGillivray on Insurance Law*, (5th Ed), para 903:

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> > Facts known to insurers. It is obvious that the insurers cannot complain of having been deceived when from some other source they had knowledge of the facts which they say were not communicated. As Cockburn CJ put it in *Bates v Hewitt* (1867) LR 2 QB 595, 605, the insurers cannot set up the defence of non-disclosure, not because the assured will have complied with the obligations which rested on him to communicate that which was material, but because it will not lie in the mouth of the underwriter to say that a material fact was not communicated to him which he had present to his mind at the time he accepted the insurance. Probably even if the non-disclosure by the assured was intentional

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and fraudulent, the insurers cannot set aside the policy if, by reason of their knowledge, the non-disclosure did not influence their judgment.

[6] Further the thrust of P&O's application rests on the statutory declaration of D1 as in 'UD3'. I have mentioned the essence of the statutory declaration in para 2. The truth or otherwise of it has not tested by D3. It has therefore not been strictly proved.

[7] In *Merchants' and Manufacturers, Insurance Co Ltd v Hunt and Others* [1941] 1 All ER 123 the insurers sought two declarations, that they were entitled to avoid a policy of insurance on the ground of non-disclosure and that they were under no liability to indemnify the respondents (Hunt). There the respondent, Charles Hunt had taken out the policy and his son John Hunt was driving his father's car with his father's permission when the accident involving Percy and Maltida Thorne (the Thornes) occurred. The Thornes brought an action against John Hunt and his son. At p 124 appears the following note:

EDITORIAL NOTE. At the trial of the action, it was held that the admissions of the insured party and his son, though strictly only evidence against themselves, could be made the basis of a declaration which would be binding on all parties to the action. The Court of Appeal have wholly disagreed with this holding, and all members of the court are emphatically of opinion that the injured persons, who had been made parties to the action for a declaration, were vitally interested in requiring that the falsity of the representations relied on by the insurance company should be strictly proved.

[8] The commentary on *Merchants' and Manufacturers, Insurance Co Ltd* is to be found in *The Law of Motor Insurance* at pp 311–312 by S Santhana Das 2010 Marsden Law Book as follows:

The issue before the Court of Appeal was whether the admissions by the insured and his son could be made the basis of a declaration which would be binding on all parties to the action including the injured third party. The Court of Appeal emphatically held that the injured persons, who had been made parties to the action for a declaration, were vitally interested in requiring that falsity of the representation relied on by the insurance company should be strictly proved. The Court held that the injured third party as defendants to the action was entitled to have the age of JH proved, either by the production and identification of his birth certificate or by the evidence of some person present at his birth, and to have any convictions against him proved by the defendant by the production of proper certificates of such conviction rather than relying purely on the admissions of the insured and JH.

[9] P&O had contended D3's rights would not be affected by the declaration as D3 is not a party to the contract of insurance. D3's right to recover is

entrenched in s 96(1) of the Road Transport Act 1987 ('RTA') just as P&O's right as against the insured is in s 96(3) of the RTA. The aforesaid provisions are as follows:

> 96(1) If, after a certificate of insurance has been delivered under subsection 91 (4) to the person by whom a policy has been effected, judgement in respect of any such liability as is required to be covered by a policy under paragraph 91 (1)(b) (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may be avoided or cancelled the policy, the insurer shall, subject to this section, pay to the persons entitled to the benefit of the judgement any sum payable in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgements.
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> (3) No sum shall be payable by an insurer under subsection (1) if before the date the liability was incurred, the insurer had obtained a declaration from a court that the insurance was void or unenforceable: …

In this regard s 96(3) of the RTA when read together with s 96(1) deals with the liability of P&O towards third parties such as D3. It follows therefore there is no statutory duty on P&O to apply for a declaration as against its insured.

[10] Under the circumstances P&O's application for a declaration that the policy issued to D1 to cover motorcar No AEH 3181 void and uneforceable was dismissed.

Application dismissed.

Reported by Afiq Mohamad Noor